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U.S. DEPARTMENT OF JUSTICE
OFFICE OF ATTORNEY GENERAL

April 11, 1996

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Mr. William Caton

Acting Secretary

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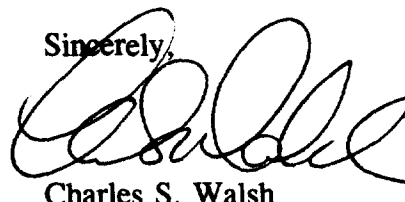
Re: CS Docket No. 96-46: Implementation of Section 302
of the Telecommunications Act of 1996
-- Open Video Systems

Dear Mr. Caton:

Enclosed for filing with the Commission please find an original and eleven copies of the Reply Comments of the Motion Picture Association of America, Inc. in the above-referenced proceeding. In accordance with the Public Notice dated March 22, 1996, two copies have been annotated as "Extra Public Copy."

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Charles S. Walsh

cc: ITS
Larry Walke

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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APR 11 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 302 of
the Telecommunications Act of 1996

Open Video Systems

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CS Docket No. 96-46

DOCKET FILE COPY ORIGINAL

To: The Commission

**REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.**

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Dated: April 11, 1996

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SUMMARY

As MPAA argued in its initial comments, Congress has attempted in the 1996 Telecommunications Act to promote competition in the video marketplace by authorizing telephone companies to establish unfranchised "open video systems." As a condition of this regulatory flexibility, Congress directed the Commission to take such actions as necessary to ensure that OVS facilities are not operated simply as unregulated cable systems and that non-telco affiliated MVPDs and program providers have an opportunity to utilize OVS capacity on a competitive basis. The proposals submitted by the major telephone companies reveal a much different vision of OVS -- one that would thwart rather than maximize the development of open and competitive outlets for video program distribution.

In particular, the telco comments seek broad freedom for OVS operators to discriminate in favor of their own affiliates so as to maximize their competitive position vis-a-vis incumbent cable operators. However, the public interest will not be served if OVS operators are able to foreclose unaffiliated competition. MPAA again urges the Commission to fulfill the Congressional goal of promoting both intermodal and intramodal competition by adopting rules to prevent discrimination with respect to channel allocation, channel position, channel sharing, rates for capacity, and the provision of information to subscribers. For example, in no case should an OVS operator be permitted to favor its own affiliate in the allocation of analog capacity. Similarly, in order to maximize the efficient use of capacity and minimize competitive differentials, any channels licensed by a programming vendor to more than one MVPD using OVS capacity must be given shared channel status, consistent with contractual rights and technical limitations. And the Commission must establish an effective complaint process for resolving discrimination complaints.

The issue of rates represents another area of disagreement between MPAA and the telephone companies. MPAA agrees with those commenters who have advocated that the Commission play a significant role in the development of reasonable and non-discriminatory rates for OVS capacity and that the telephone companies be required to publish the rates for capacity. However, there is no reason to require disclosure of rates or other confidential contractual information regarding the relationship between MVPDs and individual program vendors. Nor should the Commission link the regulation of OVS capacity rates to the regulation of cable leased access rates.

Lastly, MPAA reiterates that the Commission is required to implement rules relating to the OVS retransmission of broadcast television programming in a manner consistent with Congress' intent. This means protecting broadcast programming against discrimination vis-a-vis non-broadcast program sources and ensuring must carry protection "no greater or lesser" than that provided under Section 614 of the 1992 Cable Act. However, it does not mean ignoring the must carry limits in Section 614 or granting broadcasters greater protections against discrimination than those accorded other program vendors.

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Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
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Open Video Systems)

To: The Commission

**REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.**

The Motion Picture Association of America, Inc. ("MPAA"), by its attorneys, respectfully submits these Reply Comments in the above-referenced proceeding regarding the establishment of "open video systems" ("OVS").¹ As MPAA indicated in its initial Comments, the motion picture industry has a strong interest in the development of OVS as a mechanism for fostering competition in the video programming marketplace, thereby maximizing the unfettered flow of programming to consumers.²

¹Additional views of individual MPAA member companies may be expressed in separate submissions in this proceeding.

²MPAA's members have an interest in the availability of OVS as a means of delivering their programming to consumers either through independent multichannel video programming distributors ("MVPDs") who obtain the programming on a wholesale basis or, in the alternative, on a retail basis directly to consumers by utilizing OVS capacity themselves.

I. The Proposals Submitted By Major Telephone Companies Would Thwart Rather Than Maximize Open And Competitive Outlets For Video Distribution.

In order to promote the development of new facilities-based outlets for independent program vendors and packagers, Congress has provided several alternative approaches for telephone companies to provide video programming -- as common carriers under Title II, as franchised cable operators under Title VI, as radio-based providers such as wireless cable operators, or as OVS operators with affiliated MVPDs.³ To create an incentive for the establishment of OVS facilities -- facilities which would be accessible not only by the telco-affiliated MVPD but also by unaffiliated programmers and packagers -- Congress accorded OVS operators a measure of regulatory flexibility not otherwise available to common carriers or cable operators. However, as MPAA argued in its initial Comments, this regulatory flexibility is not a one-way street. In return for such flexibility, OVS facilities must offer real access and sufficient capacity to ensure that both telco and non-telco MVPDs are able to compete in the video marketplace.

The comments filed jointly by six major telephone companies ("Joint Telephone Parties"), as well as those of other telephone companies -- who are likely to be among the first to seek certification to provide OVS service -- propose a framework for the development of OVS that is vastly unlike what the MPAA suggested or what is required to achieve the "bargain" Congress intended. The Joint Telephone Parties urge a level of laissez faire operation that raises the prospects of telco video facilities closed to new unaffiliated MVPDs and programming vendors, and a regulatory environment so unbalanced that renders

³See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) at § 651.

meaningless the concept of competition on a level playing field among other existing MVPD competitors.

While MPAA fully supports the development of a regulatory environment that will create economic incentives for the construction of OVS facilities, MPAA is discouraged at the tenor and substance of the telephone companies' comments in this proceeding. In essence, it appears the telephone companies seek to turn the OVS concept into an opportunity to operate unregulated cable systems. Such a result would, in MPAA's view, ultimately be destructive to competition. MPAA submits the Commission should establish clear and distinct OVS regulations that not only facilitate the development of multiple outlets for video programming but also ensure that any competitive advantages enjoyed by the OVS operator's affiliated MVPD are the result of marketplace skills and program quality, not discrimination and artificial regulatory distinctions.

II. Without The Safeguards Advocated By MPAA, Discrimination Against Programming Vendors And Non-Telco MVPDs Will Occur.

MPAA and the telephone industry disagree as to whether there is a need for express regulation to prohibit an OVS operator from discriminating against non-telco MVPDs in its allocation of capacity. MPAA's Comments urged that such express regulation of the OVS operator's allocation of capacity was both appropriate and crucial to maximizing the number of MVPDs and programming vendors which can viably compete in the video marketplace. MPAA Comments at 4. The telephone companies, however, see little need for such safeguards.

The philosophy underpinning the comments of the telephone companies turns the primary goal of the Congress in authorizing the OVS framework on its head. The telephone

companies rationalize their persistent demand for open-ended discretion and unfettered ability to favor their own affiliates and programming by pointing to "[t]he absolute necessity of competing effectively against incumbent cable operators."⁴ MPAA submits that the broad freedom to discriminate sought by the telcos does great violence to the real intent of Congress to encourage fair and sustainable intermodal and intramodal competition. Non-cable MVPDs and programming vendors, unaffiliated with the telephone companies, cannot be relegated to bit players in the telephone companies' portrayal of their OVS operations as simply the "Gunfight at the OK Corral" with the cable television industry.

MPAA reiterates the position taken in its Comments that the public interest will not be served if the OVS operator is given both the freedom to foreclose unaffiliated competition on its OVS system and excessive regulatory advantages over the incumbent cable operator. As both licensors and owners of programming services, MPAA urges the Commission to reject the one-dimensional philosophy of the Joint Telephone Parties and those of other telephone interests. MPAA submits that, in light of the telephone companies' apparent antipathy to the use of OVS capacity by unaffiliated MVPDs or program vendors, the Commission must establish specific rules to prevent discrimination as to channel allocation, channel position, channel sharing, rates for capacity and marketing and information regarding the availability of programming to subscribers.

⁴Joint Telephone Parties at 18.

A. The OVS Operator Cannot Be Given Broad Discretion As To Channel Sharing, Allocation And Position.

MPAA recognizes that the OVS operator has to make certain crucial decisions regarding the operation of the OVS facility -- capacity, design, etc. And as MPAA made clear in its initial Comments, it is crucial that the Commission provide sufficient incentives for OVS operators to build and expand capacity to meet the demand of non-affiliated MVPDs and to make such capacity available on a non-discriminatory basis. MPAA Comments at 4. However, in no case should the OVS operator be permitted to discriminate in favor of its affiliated MVPD with respect to how and which programming is selected for shared channels, which MVPDs and programming obtain more desirable analog channel positioning, and how capacity is allocated among competing MVPDs.⁵

MPAA's Comments maintained that one of the most important issues in this proceeding relates to the sharing of channels. MPAA Comments at 6. A regulatory approach that maximizes channel sharing is crucial to ensuring the "open" nature of the OVS facility. In contrast, adoption of the telephone companies' position that channel sharing should be left to the OVS operator's discretion not only will produce potential inefficiencies but also inherently will lessen the number of channels available for unaffiliated MVPDs or program vendors. MPAA submits that any channels licensed by a programming vendor to more than one MVPD must be given shared status, consistent with contractual rights and technical limitations.

⁵MPAA strongly disputes the suggestion by the Joint Telephone Parties that an OVS operator should have the freedom to allocate all of its system's analog capacity to its affiliated MVPD and digital capacity to unaffiliated entities.

Similarly, the Joint Telephone Parties suggest that the OVS operator should have complete discretion with respect to channel positioning and allocation. This includes the decision "to assign programming to analog or digital channels as [the OVS operators] deem necessary to provide marketable, competitive programming packages" against incumbent cable operators.⁶ MPAA rejects this view as representing a prime example of improper and unreasonable discrimination between affiliated and unaffiliated MVPDs and program vendors. In the foreseeable future, MVPDs or program vendors with analog channel capacity will have a significant competitive advantage over those entities allocated digital capacity.

MPAA does not disagree with the proposition that an affiliated MVPD can program 100 percent of the OVS capacity until such time as unaffiliated "demand" does, in fact, exist. However, MPAA does not accept the repeatedly stated premise underlying the Joint Telephone Parties' comments -- namely, that Congress intended to give OVS operators wide latitude to design their systems and allocate capacity without regard to the significant goal of accommodating the demand of unaffiliated MVPDs.⁷ For example, the Joint Telephone Parties point to the statement in section 653(b)(1)(B) that nothing in the Act limits the absolute number of channels that the OVS operator or its affiliate could offer directly to subscribers as evidence that Congress did not intend to guarantee that unaffiliated MVPDs desiring OVS capacity could obtain it for purposes of competing as packagers of video programming directly to subscribers. Rather, Congress' sole intent, according to the Joint Telephone Parties, was to permit individual program services to seek carriage on the telco

⁶Joint Telephone Parties at 18-19.

⁷Joint Telephone Parties at 12, 13.

MVPD's package.⁸ This convoluted reading of the law by the telephone companies is erroneous. It also is telling as to what the future will hold without explicit regulation of channel allocation.

The telephone company comments also advocate that the OVS operator may treat programmers or MVPDs differently, based on their legitimate business judgments, and that a complaint of unjust and unreasonable discrimination would determine whether such judgement was reasonable. The Joint Telephone Parties argue that "[t]he Commission should not attempt to second-guess the good faith business judgment of [OVS] operators"⁹ in competing with the local cable operator. Any complainant alleging discrimination must prove the discrimination was intentional, the treatment was commercially unreasonable, and that the complainant suffered substantial and actual harm. Under the telephone companies' approach, any action they deem necessary to compete against the incumbent video distributor would not be intentional or commercially unreasonable. This approach provides the foolproof defense to virtually any complaint, under the theory that whatever the conduct

⁸Id. at 12, fn. 19. The Joint Telephone Parties find remarkable significance in the fact that Congress used the term "video programming provider" in section 653, arguing that it reflects an intent to limit certain protections of the statute only to individual program services, not to packagers or MVPDs. MPAA submits that this is a disingenuous and myopic reading of section 653. Congress, indeed, intended to protect unaffiliated wholesalers, as well as retailers of programming on an OVS facility, using the term "video programming provider" to encompass both while using the term "video programming service" to refer to individual programmers. The references in subparagraph (b)(1)(C) to permitting the sharing of channels by "more than one video programming provider" selecting the same "video programming services" is but one of many examples evidencing that the failure to add the word "multiple" in front of "video programming provider" does not support this most peculiar interpretation of the telephone companies.

⁹Joint Telephone Parties, Summary at IV.

favoring its affiliates, it was necessary to ensure an attractive, successful replacement to the incumbent cable operator. MPAA urges the Commission to reject any discrimination among different MVPDs or programming vendors and, instead, to establish an effective complaint process for alleging discrimination.

B. The FCC Must Closely Scrutinize An OVS Operator's Rates, Terms And Conditions Of Access.

The Joint Telephone Parties and other telephone entities argue that, because OVS facilities are not subject to regulation as common carriers, there is no authority for the Commission to use Title II-like regulations to require prices, terms and conditions to be just and reasonable. The telephone companies argue that competitive market forces will operate to ensure reasonable OVS rates so that no rules are needed. Moreover, despite the assurance that rates, terms and conditions will be reasonable and non-discriminatory, telephone comments strongly oppose any rate filings or requirement to make their contracts with affiliates or others public.

MPAA's Comments recommended that the Commission assist in the development of a rate formula that produces the lowest possible non-discriminatory rate consistent with the OVS operator's cost. MPAA Comments at 8. Other commenters urged similar Commission involvement and continued scrutiny by the Commission to ensure that rates are reasonable and non-discriminatory.¹⁰ Many of these same parties also argued that the public filing of rates be compelled as a necessary safeguard to protect non-affiliates and other programmers

¹⁰See, e.g., Comments of NCTA at 19; Comments of the State of New Jersey, Division of Ratepayer Advocate at 7; Comments of the California Public Utilities Commission at 5-6.

deemed less desirable by the OVS operator from rate discrimination.¹¹ MPAA agrees with the importance of requiring the disclosure of the rates for capacity between OVS operator and MVPDs but stresses that rates or other confidential contractual information between MVPDs and individual programmers need not and should not be subject to disclosure.

While firmly supporting comments urging close scrutiny over an OVS operator's rates, MPAA disagrees with suggestions that the rate formulas for access to a OVS capacity and for commercial leased access on a cable system should be linked.¹² MPAA submits that the underlying benefits associated with obtaining access in each case are drastically different. In the OVS context, access by a programming vendor or packager to capacity means simply access to the underlying platform and facilities. In contrast, obtaining leased access capacity from a cable system involves, in part, access to an existing package of services assembled by the cable operator and marketed by it to a sizeable universe of subscribers. The value to a programming vendor of access to a subscriber's existing package on a cable system obviously is much different than the value to such vendor associated with the simple access to channel capacity afforded by OVS.

C. Program Access.

One telephone company commenter, NYNEX, argues that OVS operators should be given the freedom to deny access to the system by any entity holding either exclusive rights to a programming service or favorable contract terms that effectively preclude others from

¹¹Comments of NCTA at 20; Comments of TCI at 14.

¹²Comments of Continental Cablevision at 7-9; Comments of NCTA at 20.

distributing the program service on that OVS facility.¹³ In support of this position, NYNEX cites section 616 of the 1992 Cable Act which prohibits an MVPD from unreasonably denying a programmer distribution based on its lack of affiliation with the MVPD.¹⁴ But NYNEX's citation of section 616 is both incomplete and misplaced. Section 616 was intended to protect unaffiliated programming vendors against coercion by MVPDs such as cable operators and telco or other MVPDs. Apart from certain program access requirements, voluntary agreements by programming vendors with MVPDs are encouraged, not restrained by the law.¹⁵

It is ironic that the telephone companies maintain that OVS operators should have discretion to discriminate against a video programmer or MVPD on the basis of legitimate business judgment, including the attractiveness of the programming to potential subscribers. Yet, the same telcos would remove that discretion from program licensors and copyright owners by forcing them to provide such programming to the telco-MVPD if that programming is deemed desirable by the OVS operator and its affiliate. NYNEX indeed has it backwards. The Congress did not intend to permit an "open" video system operator to deny access or otherwise discriminate as to certain MVPDs or program vendors. Congress

¹³No mention is made by NYNEX of a seemingly more likely situation where the OVS operator uses the grant of exclusivity for its affiliate as a criteria for granting access, or determining rate, channel position, or other terms of the contract with unaffiliated programming vendors.

¹⁴NYNEX Comments at 12, fn. 30.

¹⁵ MPAA also opposes the suggestion by NYNEX that exclusivity arrangements involving non-satellite distributed programming, currently permitted under the law, should be foreclosed. Section 628 of the 1992 Cable Act clearly limits the scope of mandated program

did intend to allow voluntary agreements between program vendors and MVPDs in order to differentiate particular program packages if such exclusivity or more favorable terms are consistent with sections 616 and 628 of the law.

III. The Commission's Rule Should Carry Out Congress' Intent With Respect To The Carriage Of Broadcast Programmings On OVS Facilities.

The 1996 Act specifically directs the Commission to adopt rules relating to the retransmission of broadcast television programming on OVS facilities. In particular, the Commission is required to adopt rules pertaining to the application of syndicated exclusivity, network non-duplication, and sports blackout protection in the OVS context and to the implementation of must-carry and retransmission consent. MPAA's Comments urged the Commission to carry out the statutory mandate in a manner that is consistent with Congress' intent. MPAA Comments at 12-14.

Fulfilling Congressional intent with respect to the retransmission of broadcast programming via OVS clearly means protecting broadcasters against discrimination vis-a-vis other non-broadcast program sources. However, the broadcast industry appears at times to be seeking not merely even-handed treatment, but preferential treatment.¹⁶ While MPAA agrees that broadcasters must be accorded their must-carry and retransmission consent rights in the OVS context and that the syndicated exclusivity, network non-duplication and sports blackout rules must be enforced, there is no basis for granting broadcasters additional protections against discriminatory treatment without according similar protections to non-broadcast programmers.

¹⁶See, e.g., ALTV Comments at 7 (proposing limit on number of actions that a subscriber must take to access broadcast signals).

In addition, MPAA takes exception to the broadcasters' suggestions that there should be no limits on the number of stations entitled to mandatory carriage in the OVS context.¹⁷ The statute makes clear that the broadcast industry's must-carry rights are to be "no greater or lesser" in the OVS context than in the cable context. Consequently, the broadcast industry's "first claim" on OVS capacity is subject to the limits specified in section 614 of the 1992 Cable Act.

Finally, MPAA wishes to reiterate its concern that the Commission make clear that its implementation of OVS is not intended to resolve issues relating to the application of the cable compulsory license to OVS operation and MVPDs utilizing OVS capacity. Those issues, as MPAA pointed out, are best left to Congress, the Copyright Office, and the courts.

IV. Conclusion.

For the foregoing reasons, the Commission should adopt OVS regulations and policies consistent with MPAA's Comments and Reply Comments.

Respectfully submitted,

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OF AMERICA, INC.

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Dated: April 11, 1996

¹⁷NAB Comments at 14; ALTV Comments at 4.